

**Subpart UU—Vermont**

7. Section 52.2370 is amended by adding paragraph (c)(21) to read as follows:

**§ 52.2370 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(21) Revisions to the State Implementation Plan submitted by the Vermont Air Pollution Control Division on August 9, 1993.

(i) Incorporation by reference.

(A) Letter dated August 9, 1993 from the Vermont Air Pollution Control Division submitting revisions to the Vermont State Implementation Plan. Vermont resubmitted Vermont's rule entitled "Registration of Air Contaminant Sources," Sections 5-801 through 5-806 and the SIP narrative entitled "State of Vermont Air Quality Implementation Plan, February 1993" to meet the emission statement

requirements of the Clean Air Act Amendments of 1990.

(B) Letter dated February 4, 1993 from the Vermont Air Pollution Control Division submitting revisions to the Vermont State Implementation Plan which included Vermont's rule entitled "Registration of Air Contaminant Sources," Sections 5-801 through 5-806 and the SIP narrative entitled "State of Vermont Air Quality Implementation Plan, February 1993" to meet the emission statement requirements of the Clean Air Act Amendments of 1990. Sections 5-801 through 5-806 were previously adopted by Vermont and became effective on April 20, 1988.

(C) Section 5-801 "Definitions," section 5-802 "Requirement for Registration," section 5-803 "Registration Procedure," section 5-804 "False or Misleading Information," section 5-805 "Commencement or Recommendation of Operation," and

section 5-806 "Transfer of Operation" effective on April 20, 1988.

(ii) Additional materials.

(A) Vermont's SIP narrative entitled "State of Vermont Air Quality Implementation Plan, February 1993" which addresses emission statement requirements not covered by sections 5-801 through 5-806.

(B) Letter dated October 5, 1994 from the Vermont Air Pollution Control Division which clarifies Vermont procedures in developing the emission statement information.

(C) Nonregulatory portions of the submittal.

8. In § 52.2381 Table 52.2381 is amended by adding a new entry to existing state citation "section 5-801" and adding new state citations "5-802 through 5-806" to read as follows:

**§ 52.2381 EPA-approved Vermont State regulations.**

\* \* \* \* \*

TABLE 52.2381.—EPA-APPROVED RULES AND REGULATIONS

State citation, title and subject	Date adopted by state	Date approved by EPA	Federal Register citation	Section 52.2370	Comments and unapproved sections
* * *	*	*	*	*	*
Section 5-801, Definitions .....	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21) .....	*
* * *	*	*	*	*	*
Section 5-802, Requirement for Registration.	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21) .....	*
* * *	*	*	*	*	*
Section 5-803, Registration Procedure.	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21) .....	*
* * *	*	*	*	*	*
Section 5-804, False or Misleading Information.	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21) .....	*
* * *	*	*	*	*	*
Section 5-805, Commencement or Recommendation of Operation.	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21) .....	*
* * *	*	*	*	*	*
Sections 5-806, Transfer of Operation.	4/20/88	Jan. 10, 1995 ...	[Insert <i>FR</i> citation from published date].	(c)(21).	*

[FR Doc. 95-567 Filed 1-9-95; 8:45 am]

BILLING CODE 6560-50-P

**40 CFR Part 70**

[NM002; FRL-5136-1]

**Clean Air Act Interim Approval of Operating Permits Program; City of Albuquerque Environmental Health Department, Air Pollution Control Division**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The EPA is promulgating interim approval of the operating permits program submitted by the New Mexico Governor's designee, Mr. Lawrence Rael, for the City of Albuquerque as Chief Administrative Officer, and for Bernalillo County as the administrative head of the Albuquerque/Bernalillo County Operating Permits Program, for the

purpose of complying with Federal requirements for an approvable program to issue operating permits to all major stationary sources, and to certain other sources with the exception of Indian Lands.

**DATES:** This direct final rule is effective on March 13, 1995 unless adverse or critical comments are received by February 9, 1995.

**ADDRESSES:** Written comments on this action should be addressed to Ms. Jole C. Luehrs, Chief, New Source Review Section, at the EPA Region 6 Office listed. Copies of the City's submittal and other supporting information used in developing the final rule are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before visiting day.

Environmental Protection Agency, Region 6, Air Programs Branch (6T-AN), 1445 Ross Avenue, suite 700, Dallas, Texas 75202-2733. City of Albuquerque/Bernalillo County, Environmental Health Department, One Civic Plaza, NW., room 3023, Albuquerque, New Mexico 87103.

**FOR FURTHER INFORMATION CONTACT:** Adele D. Cardenas, New Source Review Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue, suite 700, Dallas, Texas 75202-2733, telephone 214-665-7210.

#### SUPPLEMENTARY INFORMATION:

### I. Background and Purpose

#### A. Introduction

In title V of the 1990 Clean Air Act Amendments (sections 501-507 of the Clean Air Act ("the Act")), the EPA has promulgated rules which define the minimum elements of an approvable State/local operating permits program, and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of a State/local operating permits program (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) part 70. Title V requires States/local areas to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that States/local areas develop and submit these programs to the EPA by November 15, 1993, and that the EPA act to approve or disapprove each program within one year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part

70 regulations which together outline criteria for approval and disapproval. Where a program substantially, but not fully, meets the requirements of part 70, the EPA may grant the program interim approval for a period of up to two years. If the EPA has not fully approved a program by two years after the date of November 15, 1993, or by the end of an interim program, it must establish and implement a Federal program.

The EPA is publishing this action without prior proposal because the EPA views this as a noncontroversial action and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, the EPA is proposing interim approval of the operating permits program submitted by the City of Albuquerque/Bernalillo County should adverse or critical comments be filed. Under the procedures established in the May 10, 1994, **Federal Register**, this action will be effective on March 13, 1995 unless, by February 9, 1995 adverse or critical comments are received.

### II. Proposed Action and Implications

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on March 13, 1995.

#### A. Analysis of City/County Submission

##### 1. Support Materials

Pursuant to section 502(d) of the Act, the State/local area is required to develop and submit to the Administrator an operating permits program under State or local law or under an interstate compact meeting the requirements of title V of the Act. Bernalillo County and the City of Albuquerque within the County are granted the authority to administer a local air pollution control program by the New Mexico Air Quality Control Act. The Air Pollution Control Division (APCD) of the City of Albuquerque Environmental Health Department requested in the original submittal, under the signature of Governor Bruce King, approval with full authority to administer the City of Albuquerque/Bernalillo County Operating Permits Program, prepared by APCD, in all areas

of Bernalillo County in the State of New Mexico with the exception of Indian lands.

Pursuant to NMSA 1978 section 74-2-1 *et seq.* (Repl. Pamph. 1993), Bernalillo County and the City of Albuquerque have created a joint local authority, the Albuquerque/Bernalillo County Air Quality Control Board, to adopt regulations, administer and enforce the State Air Quality Control Act, the City Joint Air Quality Control Ordinance and the Air Quality Control Board Regulations within Bernalillo County.

The City of Albuquerque/Bernalillo County submitted their final operating permits program to the EPA Regional Office on April 4, 1994. The title V program covering the City and County was signed by the Governor's designee Mr. Lawrence Rael, for the City of Albuquerque as Chief Administrative Officer and for Bernalillo County as the administrative head of the Albuquerque/Bernalillo County Operating Permits Program, for the purpose of complying with Federal requirements.

In the APCD operating permits program submittal, the City of Albuquerque/Bernalillo County does not assert jurisdiction over Indian lands or reservations. To date, no tribal government in New Mexico has authority to administer an independent air program in the County of Bernalillo. Upon promulgation of the Indian air regulations, Indian tribes will then be able to apply as States, and receive the authority from the EPA to implement an operating permits program under title V of the Act. The EPA will, where appropriate, conduct a Federal title V operating permits program in accordance with forthcoming EPA regulations, for those Indian tribes which do not apply for treatment as States under the Act.

The City of Albuquerque/Bernalillo County submittal provided an operating permits program plan which outlines items in the following sections: Item II—"Operating Permits Program Description," addresses 40 CFR 70.4(b)(1) by describing how APCD intends to carry out its responsibilities under the part 70 regulations. The program description addresses the following areas: (A) Organizational structure, (B) Regulations, guidelines, policies and procedures, and (C) Future regulatory actions (40 CFR 70.4(b)(3)(i) and (v)). The program description has been deemed to be appropriate for meeting the requirement of 40 CFR 70.4(b)(1).

Pursuant to 40 CFR 70.4(b)(3), the Governor or his designee is required to

submit a legal opinion from the Attorney General (or the attorney for the State or local air pollution control agency that has independent legal counsel) demonstrating adequate authority to carry out all aspects of a title V operating permits program. The Albuquerque City Attorney submitted a Final City Attorney's Opinion and a First and Second Supplemental City Attorney's Opinion on behalf of both the City of Albuquerque and Bernalillo County.

This is because, as explained in the Second Supplemental City Attorney's Opinion, the City Attorney provides legal advice to the City pursuant to City Ordinance 1-20-1 R.O. 1974, and the City Attorney, with the consent of Bernalillo County, is independent counsel for the joint Albuquerque/Bernalillo County Air Quality Control Board. The administrative agency for this joint board is the City Environmental Health Department, as provided in Albuquerque/Bernalillo County AQC regulations 2.12 and 1.13. The APCD, a subdivision of the City Environmental Health Department, was given the responsibility of preparing and implementing the City/County title V program. Therefore, under the authority of NMSA 1978 section 74-2-1, *et seq.*, and consistent with his role as independent counsel for the City of Albuquerque/Bernalillo County Air Quality Control Board and the City Environmental Health Department, the City Attorney in his First and Second Supplemental City Attorney's Opinion addressed the required authority to implement the City/County's title V operating permits program.

As explained in the Second Supplemental City Attorney's Opinion, the City Amended Ordinance and the County Amended Ordinance do not repeat the felony violation language of Air Quality Control (AQC) Act section 74-2-14.C verbatim. This is because of a New Mexico Constitutional requirement that felony violations must be initiated and prosecuted by the State Attorney General or the State District Attorney. State law requires all violations of City and County ordinances to be prosecuted in Metropolitan Court, for which the New Mexico Constitution limits jurisdiction to non-felony cases. Therefore, the City and County ordinances do not state that the felony violations detailed in AQC Act section 74-2-14.C are also ordinance violations. Since State statute requires that felonies committed within the City and County be initiated and prosecuted by the State Attorney General or District Attorney, this is not an obstacle to part 70 approval.

The legal opinions submitted by the City Attorney demonstrate adequate legal authority as required by Federal law and regulation to implement and enforce a part 70 operating permits program except with regard to criminal fine authority as discussed below. The City Attorney, in Albuquerque's Final City Attorney's Opinion, acknowledged that the EPA had determined that a statutory revision would be required to render the State's criminal fine authority consistent with the requirements of 40 CFR 70.11 (a)(3)(ii).

The State statutes and City and County ordinances cited in the Final City Attorney's Opinion for Albuquerque/Bernalillo County authorize the imposition of criminal fines in the amounts of only \$1,000 and \$5,000 for misdemeanor and felony violations, respectively, rather than the \$10,000 per violation amounts required by 40 CFR 70.11(a)(3)(ii) for knowing violations of applicable requirements, permit conditions and fee and filing requirements. Further, those statutes and ordinances do not appear to authorize the fine amounts to be imposed per day per violation as required by 40 CFR 70.11(a)(3)(ii). Although these defects in criminal fine authority preclude the EPA from granting full approval of the City/County's operating permits program at this time, the EPA may grant interim approval, subject to the State, City and County obtaining and submitting to the EPA the needed criminal fine authority within 18 months after the Administrator's approval of the Albuquerque/Bernalillo County title V program pursuant to 40 CFR 70.4(f)(2). This will need to be accomplished through statutory revisions by the State of New Mexico and revisions to the City Joint AQC Board Ordinance and the County Joint AQC Board Ordinance by the City and County consistent with the amendments to State statute, and submission of those revisions to the EPA within the prescribed 18-month period.

As noted in the City Attorney's cover letter accompanying Albuquerque's First Supplemental City Attorney's Opinion, the State statute which provides for the delegation of authority from the State to Albuquerque/Bernalillo County for the City/County's operating permits program, New Mexico Statutes Annotated (NMSA) 1978 section 74-2-4, provides that any ordinances adopted by the City/County must be consistent with the substantive provisions of State statute and provide for standards and regulations not lower than those required by regulations adopted by the New Mexico

Environmental Improvement Board. Therefore, as explained in the above-mentioned City Attorney's cover letter, the City/County rely on the interpretation of the State Attorney General contained in the Attorney General's Opinion and Supplemental Attorney General's Opinion submitted with the New Mexico Operating Permits Program, with respect to a number of issues discussed below.

The City/County rely on the State's Supplemental Attorney General's Opinion submitted as part of the New Mexico Operating Permits Program and contained in the EPA's docket for the New Mexico part 70 program, in their interpretation of NMSA 1978 section 74-2-14.E with regard to the underlying criminal fine authority required by 40 CFR 70.11(a)(3)(iii) for tampering and false statement. The Albuquerque Supplemental City Attorney's Opinion and accompanying cover letter also reflect that the City and County rely on the requirements of NMSA 1978 section 74-2-4 for their interpretation of the identical City Amended Ordinance, section 6-16-17.B, and the identical County Amended Ordinance, section 17.B, consistent with State statute.

The EPA is also relying on the State's interpretation of its statute, NMSA 1978 section 74-2-14.E set out in New Mexico's Supplemental Attorney General's Opinion referenced above, as demonstrating that New Mexico law allows criminal fines of at least \$10,000 per day for each act of tampering and for each false statement as required by 40 CFR 70.11(a)(3)(iii), and on the City and County interpretation of their identical provisions in the City and County Amended Ordinances reflected in Albuquerque's First Supplemental City Attorney's Opinion consistent with this statutory interpretation as meeting the Federal requirement.

40 CFR 70.4(b)(3)(i) requires that a State/local agency demonstrate adequate legal authority to issue permits and assure compliance with each applicable requirement of 40 CFR part 70. Both the New Mexico regulation, Air Quality Control Regulation (AQCR) 770.III.C.1.d and the Albuquerque/Bernalillo County regulation, Air Quality Control (AQC) 41.03(C)(1)(d), state that "the department may impose conditions regulating emissions during start-up and shutdown." The EPA is relying on the State's interpretation of this language, discussed in the State's Supplemental Attorney General's Opinion referenced above, and the City/County interpretation of their corresponding regulation as set out in Albuquerque's First Supplemental City Attorney's Opinion, in interpreting this language to

allow the permitting authority to impose requirements which exceed title V applicable requirements, but not to waive any title V requirements for title V sources.

40 CFR 70.4(b)(4) requires the submission of relevant permitting program documentation not contained in the regulations, such as permit forms and relevant guidance to assist in the City's implementation of its permits program. The City of Albuquerque/Bernalillo County address this requirement in the operating permits program plan part of the submittal under Section IV—Appendices B, C and H.

## 2. Regulations and Program Implementation

The City of Albuquerque/Bernalillo County have submitted Air Quality Control (AQC) regulation No. 41—“Operating Permit Regulations” and AQC No. 21—“Fee Regulations,” for implementing the City of Albuquerque/Bernalillo County part 70 program as required by 40 CFR 70.4(b)(2). Sufficient evidence of their procedurally correct adoption was submitted in the final submittal on April 4, 1994. Copies of all applicable State and local statutes and regulations which authorize the part 70 program, including those governing State/City administrative procedures, were submitted with the City's program. The City of Albuquerque/Bernalillo County also submitted a list of insignificant activities with the submittal for the EPA's review and approval with the City/County operating permits program. This list, which underwent the City/County public participation process during the operating permits regulation hearing, is being approved by the Regional Office with this document. The list can be found in the submittal under Item II—“Operating Permits Program Description,” Attachment II-3—“List of Insignificant Activities.”

The City of Albuquerque/Bernalillo County operating permits regulations followed the State of New Mexico operating permits regulation AQCR 770. The State's regulations follow part 70 very closely with a few exceptions. The cross-reference chart submitted with the State's operating permits program submission can also be used for reviewing the City/County's program due to the close similarity of the State and City/County permit regulations. The New Mexico submittal addresses the cross-reference chart under Item VI—“Various Provisions”, Attachment VI-1, indicating where each paragraph of the part 70 regulation is addressed in AQCR 770. The City submitted AQC 41, the

Operating Permits Regulations for the City, as Attachment I in the Final City Attorney's Opinion. The following requirements, set out in the EPA's part 70 operating permits program review, are addressed in the operating permits program plan and in AQC 41—Attachment I of the City/County's submittal as follows: (A) Applicability criteria, including any criteria used to determine insignificant activities or emissions levels (40 CFR 70.4(b)(2)): AQC 41.02, “List of Insignificant Activities”; (B) Provisions for continuing permits or permit terms if a timely and complete application is submitted, but action is not taken on a request prior to permit expiration (40 CFR 70.4(b)(10)): AQC 41.04(A)(4); (C) Provisions for action on permit applications (40 CFR 70.4(b)(6)): AQC 41.04(A)(3); (D) Provisions for permit content (including 40 CFR 70.4(b)(16)): all applicable requirements: AQC 41.03(C)(1); a fixed term: AQC 41.03(C)(2); monitoring and related recordkeeping and reporting requirements: AQC 41.03(C)(3) through (5); source compliance requirements: AQC 41.03(C)(7); (E) Operational flexibility provisions (40 CFR 70.4(b)(12)): AQC 41.03(C)(8); (F) Provisions for permit issuance, renewals, reopenings and revisions, including public, the EPA and affected State review to be accomplished in an expeditious manner (40 CFR 70.4(b)(13) and (16)): AQC 41.04; and (G) If the permitting authority allows off-permit changes, provisions assuring compliance with sections 70.4(b)(14) and (15): AQC 41(C)(9). The AQC regulations in section 41.04(H) provide that applicants can receive variances from non-Federal conditions only. The City/County prevent any source from receiving a variance from any AQC 41 or part 70 requirement. The City of Albuquerque/Bernalillo County's definition of “title I modification” does not include changes reviewed under a minor new source preconstruction review program (“minor NSR changes”). The EPA is currently in the process of determining the proper definition of that phrase. As further explained below, EPA has solicited public comment on whether the phrase “modification under any provision of title I of the Act” in 40 CFR 70.7(e)(2)(i)(A)(5) should be interpreted to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under Title I of the Act. This would include State preconstruction review programs approved by EPA as part of the State Implementation Plan under section

110(a)(2)(C) of the Clean Air Act and regulations addressing source changes that trigger the application for National Emission Standard for Hazardous Air Pollutants (NESHAP) established pursuant to section 112 of the Act prior to the 1990 Amendments.

For the reasons set forth in the EPA's proposed rulemaking to revise the interim approval criteria of 40 CFR part 70 (59 FR 44572, August 29, 1994), the EPA believes the phrase “modification under any provision of title I of the Act” in 40 CFR 70.7(e)(2)(i)(A)(5) is best interpreted to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under title I of the Act. This would include State/local preconstruction review programs approved by EPA as part of the State Implementation Plan under section 110(a)(2)(C) of the Act and regulations addressing source changes that trigger the application of NESHAPs established pursuant to section 112 of the Act prior to the 1990 amendments, and would include minor NSR changes not covered under the City of Albuquerque/Bernalillo County operating permits program's definition of “title I modification”.

On August 29, 1994, the EPA proposed revisions to its criteria for interim approval of State/local operating permits programs under 40 CFR 70.4(d) to allow State/local operating permits programs with a narrower definition of “title I modification” like the City of Albuquerque/Bernalillo County's to receive interim approval (59 FR 44572). The EPA also solicited public comment on the proper interpretation of “title I modification.” (59 FR 44572, 44573). The EPA stated that if, after considering the public comments, it continued to believe that the phrase “title I modifications” should be interpreted as including minor NSR changes, it would revise the interim approval criteria as needed to grant States/locals that adopted a narrower definition, interim approval.

The EPA intended to finalize its revisions to the interim approval criteria under 40 CFR 70.4(d) before taking final action on part 70 operating permits programs submitted by the State/locals. However, it will not be possible to delay approval of operating permits programs until final action has been taken on EPA's proposed revisions to the part 70 interim approval criteria. This is because publication of the proposed revisions was delayed until August 29, 1994, and the EPA received several requests to extend the public comment

period until November 27, 1994.<sup>1</sup> Given the importance of the issues in that rulemaking to States/locals, sources and the public, but mindful of the need to take action quickly, the EPA agreed to extend the comment period until October 28, 1994 (see 59 FR 52122 (October 14, 1994)). Consequently, final action to revise the interim approval criteria will not occur before the deadline for EPA action on State/local operating permits programs such as the City of Albuquerque/Bernalillo County's, that were submitted on or before November 15, 1993.<sup>2</sup> The EPA believes it would be inappropriate to delay action on the City of Albuquerque/Bernalillo County's operating permits program, perhaps for several months, until final action is taken on the proposed revisions to the part 70 interim approval criteria. The EPA also believes it would be inappropriate to grant interim approval to the City of Albuquerque/Bernalillo County on this issue before final action is taken to revise the current interim approval criteria of 40 CFR 70.4(b) to provide a legal basis for such an interim approval. Until the revision to the interim approval criteria is promulgated, the EPA's choices are to either fully approve or disapprove the narrower "title I modification" definition in States/locals such as the City of Albuquerque/Bernalillo County. For the reasons set forth below, the EPA believes that disapproving such operating permits programs at this time based solely on this issue would be inappropriate.

First, the EPA has not yet conclusively determined that a narrower definition of "title I modification" is incorrect and thus a basis for disapproval (or even interim approval). The EPA has received numerous comments on this issue as a result of the August 29, 1994, **Federal Register** document, and the EPA cannot and will not make a final decision on this issue until it has evaluated all comments on that proposed rulemaking. Second, the EPA believes that the City of Albuquerque/Bernalillo County Operating Permits Program should not be disapproved because the EPA itself has not yet been able to resolve this issue through rulemaking. Moreover,

disapproving operating permits programs from States/locals such as the City of Albuquerque/Bernalillo County that submitted their operating permits programs to the EPA on or before the November 15, 1993, statutory deadline, could lead to the unfair result that these States/locals would receive disapprovals, while States/locals which were late in submitting operating permits programs could take advantage of revised interim approval criteria should those criteria become final. In effect, States/locals would be severely penalized for having made timely operating permits program submissions to the EPA. Finally, disapproval of a State/local operating permits program for a potential problem that primarily affects permit revision procedures would delay the issuance of part 70 permits, hampering State/local/Federal efforts to improve environmental protection through the operating permits program.

For the reasons mentioned above, the EPA is approving the City of Albuquerque/Bernalillo County Operating Permits Program's use of the narrower definition of "title I modification" at this time.<sup>3</sup> However, should the EPA in the interim approval criteria rulemaking make a final determination that such a narrow definition of "title I modification" is incorrect and that a revision of the interim approval criteria is warranted, the EPA will propose further action on City of Albuquerque/Bernalillo County's operating permits program so that the City/County's definition of "title I modification" could become grounds for interim approval requiring revision prior to the EPA's granting of full approval to that program.<sup>4</sup> An operating permits program like the City of Albuquerque/Bernalillo County's that receives full approval of its narrower "title I modification" definition pending completion of the EPA's rulemaking must ultimately be placed on an equal footing with programs of States/locals that receive interim approval in later months under any revised interim approval criteria because of the same issue. Converting the full approval on this issue to an interim approval after the EPA completes its rulemaking

would avoid this inequity. The EPA anticipates that an action to convert the full approval on the "title I modification" issue to an interim approval would be effected through an additional rulemaking, so as to ensure that there is adequate notice of the change in approval status.

### 3. Permit Fee Demonstration

In AQC 21, the City/County's fee regulation, the City/County board established fees for criteria air pollutants which are below the presumptive minimum set out in 40 CFR 70.9(b)(2)(iv). The City/County regulation allows for a fee of \$22.00 per ton for criteria pollutants based on allowable emissions at major sources as defined in AQC Number 41—"Operating Permits" regulations. For facilities which are also major for hazardous air pollutants (HAP), the fees are \$250 per ton for the 189 HAPs listed in title III of the 1990 Amendments. These fees, when converted using the EPA criteria, result in the collection of an average of \$29.84 per ton for title V sources. The City/County board, after careful review, determined that these fees would support the title V permit program costs as required by 40 CFR 70.9(a). The City of Albuquerque/Bernalillo County explain in their fee demonstration that they chose this fee structure because it allowed for program costs to be covered without unduly penalizing any industry, and the fees generated would meet, but not likely exceed, program costs. The APCD will conduct a periodic review of the program fee schedule. The City of Albuquerque/Bernalillo County fee demonstration shows that this fee schedule meets the requirements for an operating permits program in the City of Albuquerque and Bernalillo County. The APCD will collect \$292,518 dollars per year to support all applicable part 70 activities for the City/County. The APCD projects the direct cost to fund the operation of the title V program to be approximately \$195,000 dollars per year, and the indirect cost to be approximately \$97,500. The APCD anticipates increasing its air quality staff by 6.3 new full time employees, a total of 1/3 of the existing air program staff. Any changes in the fees would need to be made by APCD through the Albuquerque/Bernalillo County Air Control Board.

### 4. Provisions Implementing the Requirements of Other Titles of the Act

The City of Albuquerque/Bernalillo County acknowledge that their request for approval of a part 70 program is also a request for approval of a program for

<sup>1</sup> EPA originally established a 30-day public comment period for the August 29, 1994, proposal. In response to several requests for extension, however, EPA agreed to allow an additional thirty days for public comments. See 59 FR 52122 (October 14, 1994).

<sup>2</sup> Section 502(d) requires, in relevant part, that "[n]ot later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part."

<sup>3</sup> At the present time, therefore, the EPA is not construing 40 CFR sections 70.7(e)(2)(i)(A)(3) and 70.7(e)(2)(i)(A)(5) to prohibit Albuquerque/Bernalillo County from allowing minor NSR changes to be processed as minor permit modifications.

<sup>4</sup> State programs with a narrower "title I modification" definition that are acted upon by EPA after an Agency decision that such a narrower definition is inappropriate would be considered deficient, but would be eligible for interim approval under revised 40 CFR section 70.4(b).

delegation of unchanged section 112 standards under the authority of section 112(l) as they apply to part 70 sources. Upon receiving approval under section 112(l), the City of Albuquerque/Bernalillo County may receive delegation of any new authority required by section 112 of the Act through the delegation process.

The City of Albuquerque/Bernalillo County have the option at any time to request, under section 112(l) of the Act, delegation of section 112 requirements in the form of City regulations which the City/County demonstrate are equivalent to the corresponding section 112 provisions promulgated by the EPA. At this time, the City/County plan to use the mechanism of incorporation by reference to adopt unchanged Federal section 112 requirements into their regulations.

The radionuclide NESHAP is a section 112 regulation and therefore, also an applicable requirement under the City/County operating permits program for part 70 sources. There is not yet a Federal definition of "major" for radionuclide sources. Therefore, until a major source definition for radionuclides is promulgated, no source would be a major section 112 source solely due to its radionuclide emissions. However, a radionuclide source may, in the interim, be a major source under part 70 for another reason, thus requiring a part 70 permit. The EPA will work with the City/County in the development of their radionuclide program to ensure that permits are issued in a timely manner.

Section 112(g) of the Act requires that, after the effective date of a permits program under title V, no person may construct, reconstruct or modify any major source of any HAPs unless the State/local agency determines that the maximum achievable control technology (MACT) emission limitation under section 112(g) will be met. Such determination must be made on a case-by-case basis where no applicable limitations have been established by the Administrator. During the transition period from the title V effective date to the date the City/County have taken appropriate action to implement the final section 112(g) Federal rule, proposed on April 1994 (59 FR 15504), (either by adoption of the unchanged Federal rule or approval of an existing State rule under section 112(l)), the City of Albuquerque/Bernalillo County intend to implement section 112(g) of the Act through the City/County's preconstruction process using a two-pronged approach.

Immediately upon approval of their operating permits program, the City/

County intend to implement section 112(g) through their existing preconstruction rule, AQC Regulation 20. This rule was previously approved by the EPA to implement the preconstruction requirements of title I of the Act.

The second phase of the City/County's section 112(g) implementation approach during the transition period is expected to be based on the City/County board's adoption of the New Mexico State rule, AQCR 755, into their existing City/County regulations, AQC Regulation 20 and Regulation 41. The New Mexico State rule, AQCR 755 clarifies the requirements set out in the proposed Federal section 112(g) rule and its preamble.

The City/County anticipate that the incorporation of the language of the State rule into City/County AQC Regulations 20 and 41 will be effective by mid-March 1995. When final, this incorporation is expected to enhance the mechanism contained in Albuquerque's existing preconstruction rule, AQC Regulation 20, for the implementation of section 112(g). If the New Mexico State rule AQCR 755 is not finally incorporated by the City/County, or is incorporated with substantial changes from the State rule as promulgated, the City/County rule, AQC Regulation 20 will continue to provide authority for the implementation of Federal section 112(g). After the final Federal section 112(g) rule is promulgated, the City/County will be required to formally revise their rules accordingly.

The City of Albuquerque/Bernalillo County commit to appropriately implementing the existing and future requirements of sections 111, 112, and 129 of the Act, and all MACT standards promulgated in the future, in a timely manner. This includes a commitment to implement both promulgated section 112 Federal standards and section 112 requirements such as section 112(g) that are not federally promulgated standards.

The City of Albuquerque/Bernalillo County commit to having an acid rain program in place by April 1995. The EPA acknowledges that this date, which is later than the January 1, 1995, date set out in the EPA policy, is a result of the fact that Albuquerque/Bernalillo County will rely on the State's regulations for the development of their final acid rain regulations. Therefore, the City/County rule adoption process requires that they await final action on the State's rules prior to taking final action on their acid rain rules. This is consistent with the requirement of NMSA section 74-2-4, that the City/County requirements be no less stringent than the corresponding

State requirements. The State will meet the January 1995 date as required in policy drafted by the Acid Rain Division, and the City of Albuquerque/Bernalillo County will have their acid rain program in place by April 1995. The City/County commit to submitting copies of their draft acid rain rules, regulations and guidance for review and comment to meet the Federal implementation date to issue permits by December 1997.

## 5. Enforcement Provisions

The APCD's operating permits program submittal addressed the enforcement requirements of 40 CFR 70.4(b)(4)(ii) and 70.4(b)(5) in the operating permit program plan, Section IV(E)—"Operating Permit Program Enforcement Procedures." A copy of the signed Memorandum of Understanding between the EPA Region 6 and the APCD is kept in the Region 6 file room. This document, which is a product of negotiations between the EPA Region 6 and the APCD, was signed prior to the submittal date of the operating permits program. The Operating Permits Program Plan, Sections IV(D), IV(E) and IV(F) of the City/County's submittal, addresses the following issues: (A) Compliance tracking and enforcement plan (40 CFR 70.4(b)(4)(ii) and 70.4(b)(5)); (B) Commitment to submit enforcement information (40 CFR 70.4(b)(9)); and (C) Enforcement authority (40 CFR 70.4(b)(2) and 70.4(b)(3)(vii)).

## 6. Technical Support Document

The results of this review are shown in the document entitled "Technical Support Document," which is available in the docket at the locations noted above. The technical support documentation shows that all operating permits program requirements of part 70 and relevant guidance were met by the submittal for the APCD, except with regard to criminal fine authority.

## 7. Summary

The City of Albuquerque/Bernalillo County submitted to the EPA, an operating permits program under a cover letter dated March 25, 1994, from the New Mexico Governor's designee Mr. Lawrence Rael, for the City of Albuquerque as Chief Administrative Officer and for Bernalillo County as the administrative head of the Albuquerque/Bernalillo County Operating Permits Program. This program was submitted for the purpose of complying with Federal requirements regarding an operating permits program. The submittal has adequately addressed all sixteen (16) elements required for

full approval as discussed in part 70, except with regard to criminal fine authority. The City of Albuquerque/Bernalillo County addressed appropriately all requirements necessary to receive interim approval of the City/County's operating permits program pursuant to title V, the 1990 Amendments and 40 CFR part 70.

#### *B. Options for Approval/Disapproval and Implications*

The EPA is promulgating interim approval of the operating permits program submitted by the City of Albuquerque for Albuquerque/Bernalillo County on April 4, 1994. Interim approvals under section 502(g) of the Act do not create any new requirements, but simply approve requirements that the State/local area is already imposing. The City/County must make the following changes for this program to receive full approval: Following the State's correction of the statutory defect in criminal fine authority, correct the corresponding defects in City and County Ordinances for Albuquerque and Bernalillo County. In addition to raising the criminal fine amounts to at least \$10,000 for all offenses listed in 40 CFR 70.11(a)(3)(ii), statutory and ordinance revisions must provide authority for the imposition of those fines on a per day per violation basis, as required by 40 CFR 70.11(a)(3)(ii).

Evidence of these statutory and ordinance revisions and their procedurally correct adoption must be submitted to the EPA within 18 months of the EPA's approval of the Albuquerque/Bernalillo County Operating Permits Program. This interim approval, which may not be renewed, extends for a period of two years. During the interim approval period, the City of Albuquerque/Bernalillo County are protected from sanctions for failure to have a program, and the EPA is not obligated to promulgate a Federal permit program in the City of Albuquerque/Bernalillo County. Permits issued under a program with interim approval have full standing with respect to part 70, and the one-year time period for submittal of permit applications by subject sources begins upon interim approval, as does the three-year time period for processing the initial permit applications.

If this interim approval is converted to a disapproval, it will not affect any existing City/County requirements applicable to small entities. Federal disapproval of the City of Albuquerque/Bernalillo County submittal would not affect its local enforceability. Moreover, the EPA's disapproval of the submittal

would not impose a new Federal requirement. Therefore, the EPA certifies that such a disapproval action would not have a significant impact on a substantial number of small entities because it would not remove existing City requirements or substitute a new Federal requirement.

#### **III. Proposed Rulemaking Action**

In this action, the EPA is promulgating interim approval of the operating permits program submitted by the City of Albuquerque for Albuquerque/Bernalillo County. The program was submitted to EPA by the Governor's designee for the City/County for the purpose of complying with Federal requirements found in title V of the 1990 Amendments, and in 40 CFR part 70, which mandate that States/local areas develop, and submit to the EPA, programs for issuing operating permits to all major stationary sources, and to certain other sources with the exception of Indian Lands.

Requirements for title V approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of Federal section 112 standards as they apply to part 70 sources. Section 112(l)(5) requires that the State/local program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, as part of this interim approval, the EPA is also promulgating approval of the City/County program under section 112(l)(5) and 40 CFR 63.91 for the purpose of the City/County receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

The EPA's policy is to apply sanctions to State/local programs if the Governor or his designee fails to submit a corrected program for full approval within 18 months after the due date for the submittal. If the City/County fail to submit a complete corrected program for full approval by June 10, 1996, the EPA will start an 18-month clock for mandatory sanctions. If the City/County program fail to submit a complete program before the expiration of that 18-month period, the EPA would impose sanctions. If the EPA disapproves the City/County's corrective program, and has not determined that the City/County have corrected the deficiency within 18 months after the disapproval, then the EPA must impose mandatory sanctions. In either case, if the City/County have not come into compliance, EPA applies

the first sanction. In addition, discretionary sanctions may be applied where warranted any time after the end of the interim approval period if the City/County have not submitted a complete corrective program or EPA has disapproved a corrective program. If the EPA has not granted full approval to the City/County program by January 10, 1997, the EPA must promulgate, administer, and enforce a Federal operating permits program for the City of Albuquerque Environmental Health Department, Air Pollution Control Division.

The EPA has reviewed this submittal of the Albuquerque/Bernalillo County Operating Permits Program and is promulgating interim approval. Certain defects in the State's statutory criminal fine authority and the City/County ordinances preclude the EPA from granting full approval of the City/County's operating permits program. The EPA is promulgating interim approval of the City/County operating permits program, and the State, City and County will need to obtain the needed criminal fine authority within 18 months after the Administrator's approval of this program pursuant to 40 CFR 70.4 in order for the City of Albuquerque/Bernalillo County's title V program to be eligible for full approval.

#### **IV. Administrative Requirements**

##### *A. Request for Public Comments*

The EPA is requesting comments on all aspects of this final rule. Copies of the City/County's submittal and other information relied upon for the proposed interim approval are contained in a docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, the EPA in the development of this proposed rulemaking. The principal purposes of the docket are:

(1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and

(2) to serve as the record in case of judicial review. The EPA will consider any comments received by February 9, 1995.

##### *B. Executive Order 12866*

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

##### *C. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, 5 U.S.C. 600, *et seq.*, the EPA must prepare a regulatory flexibility analysis



assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, the EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Operating permits program approvals under section 502 of the Act do not create any new requirements, but simply approve requirements that the City/County are already imposing. Therefore, because the Federal operating permits program approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State/local action. The Act forbids the EPA from basing its actions concerning operating permits programs on such grounds (*Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (S.Ct 1976); 42 U.S.C. 7410(a)(2)).

#### List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedures, Intergovernmental relations, Operating permits.

Dated: December 23, 1994.

A. Stanley Meiburg,

Acting Regional Administrator (6A).

40 CFR part 70 is amended as follows:

#### PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by adding paragraph (b) to the entry for New Mexico to read as follows:

#### Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

\* \* \* \* \*

##### New Mexico

\* \* \* \* \*

(b) City of Albuquerque Environmental Health Department, Air Pollution Control Division: submitted on April 4, 1994; effective on March 13, 1995; interim approval expires August 10, 1996.

\* \* \* \* \*

[FR Doc. 95-547 Filed 1-9-95; 8:45 am]

BILLING CODE 6560-50-P

#### 40 CFR Part 271

[FRL-5136-2]

#### Kentucky; Final Authorization of Revisions to State Hazardous Waste Management Program

**AGENCY:** Environmental Protection Agency.

**ACTION:** Immediate final rule.

**SUMMARY:** Kentucky has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). Kentucky's revisions consist of the provisions contained in Non-HSWA Clusters IV and V. These requirements are listed in Section B of this notice. The Environmental Protection Agency (EPA) has reviewed Kentucky's applications and has made a decision, subject to public review and comment, that Kentucky's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Thus, EPA intends to approve Kentucky's hazardous waste program revisions. Kentucky's applications for program revisions are available for public review and comment.

**DATES:** Final authorization for Kentucky's program revisions shall be effective March 13, 1995 unless EPA publishes a prior **Federal Register** action withdrawing this immediate final rule. All comments on Kentucky's program revision applications must be received by the close of business February 9, 1995.

**ADDRESSES:** Copies of Kentucky's program revision applications are available during normal business hours at the following addresses for inspection and copying: Kentucky Department for Environmental Protection, Division of Waste Management, Fort Boone Plaza, Building 2, 18 Reilly Road, Frankfort, Kentucky 40601 (502) 564-6716; U.S. EPA Region IV, Library, 345 Courtland Street, NE, Atlanta, Georgia 30365; (404) 347-4216. Written comments should be sent to Al Hanke at the address listed below.

#### FOR FURTHER INFORMATION CONTACT:

Al Hanke, Chief, State Programs Section, Waste Programs Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, Georgia 30365; (404) 347-2234.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

States with final authorization under Section 3006(b) of the Resource Conservation and Recovery Act

("RCRA" or "the Act"), 42 U.S.C. 6926(b), have a continuing obligation to maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program. In addition, as an interim measure, the Hazardous and Solid Waste Amendments of 1984 (Public Law 98-616, November 8, 1984, hereinafter "HSWA") allows States to revise their programs to become substantially equivalent instead of equivalent to RCRA requirements promulgated under HSWA authority. States exercising the latter option receive "interim authorization" for the HSWA requirements under Section 3006(g) of RCRA, 42 U.S.C. 6926(g), and later apply for final authorization for the HSWA requirements.

Revisions to State hazardous waste programs are necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, State program revisions are necessitated by changes to EPA's regulations in 40 CFR Parts 260-268 and 124 and 270.

##### B. Kentucky

Kentucky initially received final authorization for its base RCRA program effective on January 31, 1985. Kentucky has received authorization for revisions to its program on December 19, 1988, March 20, 1989, May 15, 1989, and November 30, 1992. On August 3, 1994, Kentucky submitted program revision applications for additional program approvals. Today, Kentucky is seeking approval of its program revisions in accordance with 40 CFR 271.21(b)(3).

EPA has reviewed Kentucky's applications and has made an immediate final decision that Kentucky's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Consequently, EPA intends to grant final authorization for the additional program modifications to Kentucky. The public may submit written comments on EPA's immediate final decision up until February 9, 1995. Copies of Kentucky's application for these program revisions are available for inspection and copying at the locations indicated in the **ADDRESSES** section of this notice.

Approval of Kentucky's program revisions shall become effective March 13, 1995, unless an adverse comment pertaining to the State's revisions discussed in this notice is received by the end of the comment period.

If an adverse comment is received EPA will publish either (1) a withdrawal of the immediate final decision or (2) a notice containing a response to